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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 364

ZIGMUND A. MILOS, Individually and Trading as MILOS FORD SALES, Petitioner

v.

FORD MOTOR COMPANY, and A. W. KENNEDY MOTOR COMPANY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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FORD MOTOR COMPANY, and A. W. KENNEDY MOTOR COMPANY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Zigmund A. Milos, hereinafter called the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 24, 1963. (45).

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*References to this Petition or to Appendices hereto are by page number alone such as (7). References to the Appendices filed in the Court below are by page number following an R. such as (R7a or R7b). Page numbers using letter "a" are from Appendix of Appellant below (Petitioner here); the letter "b" indicates Appellee's Appendix below (Respondent here).

OPINIONS BELOW

The opinion of the Court of Appeals (infra) Appendix "A", (35-44), is not officially reported except at CCH, 1963 Trade Cases, Paragraph 70,794, at present.

The opinion of the District Court is set forth in Appellant's Appendix in the Court Below, (R. 93a) and is reported at 206 F. Supp. 86.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was dated and entered on May 24, 1963, Appendix "B" (45).

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in construing the intent and effect of the Automobile Dealers Franchise Act, and thereby erroneously decided an important question of federal law, requiring review, by holding that the Act imposes a duty upon the Respondent to refrain *solely* from "coercion, intimidation or threats of coercion or intimidation" in determining the concept of *good faith* between the parties and that such elements of fairness or equity between the parties are not to be considered despite the fact that by the terms of the contract and documents attached thereto a strenuous effort is made to provide a background and atmosphere of fair dealing and reasonableness in the contractual relations of the parties.

2. Whether the Court of Appeals, contrary to applicable law, departed from the usual course of judicial proceedings, requiring review, by affirming a judgment granted by the District Court, contrary to the verdict of the jury, and thereby deprived Petitioner of a trial by jury, wherein the evidence was re-evaluated, disallowing Petitioner the benefit of all inferences and presumptions to be drawn from the evidence and not resolving all conflicts in the evidence in favor of Petitioner in direct conflict with this Court's opinion in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959); and *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 696, (1962).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The statute involved, Public Law 1006, 84th Congress, Act of August 8, 1956, Chapter 1038, Sections 1-5, 70 Stat. 1125; 15 U.S. Code Annotated, Sections 1221-1225, is set forth as Appendix C infra, (46-48).

2. Constitution, U.S. Amendment 7

"In suits at common law where the value in controversy shall exceed 20 dollars the right of trial by jury shall be preserved, and no facts tried by a jury, shall otherwise be re-examined in any court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

1. Nature of the Case

The Petitioner filed a Complaint in the above case in two counts, the first of which charged a violation of the Anti-Trust Laws, 15 U.S.C.A. 1-7, 15, 26 Stat. 209-210, 38 Stat. 731, and a second count charging a violation of the Automobile Dealers Franchise Act, 15 U.S.C.A. 1221, et seq., 70 Stat. 1125; in which damages were claimed as a result of the termination by the Respondent, Ford Motor Company, of the franchise agreement awarded to the Petitioner for the sale of Ford automobiles and products. At the close of the Petitioner's case, the first count charging a violation of the Anti-Trust Laws was dismissed as to both original defendants. (R. 4a-5a) The action under the second count, which dealt solely with the Respondent, Ford Motor Company, proceeded in due course, was submitted to a jury which returned a special verdict in favor of the Petitioner, against the Respondent, Ford Motor Company, for damages in the amount of $75,600.00 for a loss of profits during the period August 11, 1958, to the date of trial and an additional sum of $19,400.00 as damages for loss of profits from the date of the trial to September 30, 1962. (R. 5a) At the close of the case, the Respondent submitted a motion for a directed verdict, upon which the court reserved decision; within the proper time the Respondent moved for a judgment in accordance with its motion for a directed verdict, and, the Court, after hearing arguments thereon, rendered an opinion on April 4, 1962, granted the Respondent's motion for judgment, and accordingly issued an order on the same day entering judgment in favor of the Respondent Ford

Motor Company, and against the Petitioner together with costs. (R. 6a, 7a). It was from this order solely that an appeal was taken to the Court of Appeals for the Third Circuit, which appeal was heard on January 25, 1963, and on May 24, 1963, the Court of Appeals affirmed the judgment of the District Court. That part of the action originally brought under the Anti-Trust laws and which was dismissed by the District Court was abandoned.

2. Evidence Presented In The District Court

In 1955 the Ford Motor Company (hereinafter referred to as Ford or the defendant) reviewed its sales outlets in the metropolitan area of Pittsburgh and deemed that an "open point" existed in such portion of this area that is commonly known as the Oakmont-Verona section of metropolitan Pittsburgh; even though there were three other Ford dealers within a radius of two to five miles from this point, namely, Kennedy in Cheswick, Humes in Aspinwall and Greenwald in New Kensington. (R. 30a, 31a, 51a-53a) When the Petitioner heard of this opening, he made application to the defendant for this dealership. (R. 9a, 65a).

However, while the Petitioner's application was pending, the adequacy of the facilities proffered by the Petitioner for his dealership was the subject of some discussion; several Ford representatives claimed that the facilities were inadequate. A letter was prepared by a Ford representative and signed by the Petitioner dated November 22, 1955, and is in the evi-

dence as Defendant's Exhibit 4 which contained the following statement.

> "The writer fully appreciates that the present facilities, under which I am now operating, are totally inadequate for proper representation of a Ford dealer, therefore, upon the acceptance of myself as a Ford dealer by the Ford Motor Company, I agree to secure representative and suitable facilities, including showroom, parts department, office and service department within a period of two (2) years from the date of my acceptance." (R. 13a).

Upon the signing and submission of said letter, the Ford franchise was given to the Petitioner for an indeterminate term and contract was signed on November 30, 1955. At this time Petitioner claims he was informed that his sales potential was to be "somewhat into two hundred cars per year, and that this goal was not expected of him until he had established himself." (R. 91a)

At the time of the signing of this contract, the Petitioner's facilities consisted of a one-story building approximately 60 feet by 55 feet on a lot 70 feet by 150 feet; the remaining portion of the lot, after improvements, for use as a used car lot and parking; the building was the usual four-wall, open type garage structure containing one partition separating sales and service departments. (R. 10a-12a) Pursuant to the contract establishing the franchise, the Petitioner then proceeded to implement the same by securing the list of service, signs and other equipment specified by the defendant, and during the year 1956,

this building was divided into a showroom, offices, parts department and service department. At a latter date in 1956, an additional building approximately 30 feet by 35 feet was added at the back of the Petitioner's original building as a washroom-get-ready room and an adjacent lot 25 feet by 150 feet was purchased for use as additional space for a used car lot. All of these improvements and additions were completed during the year 1956 and no other facilities or additions were made after January 1 1957. (R. 13a-18a, 25a-27a)

During the formative months of the development of the Petitioner's business, many Ford employees rendered services and advice in aid of establishing the said business. However, early in 1956, differences arose between the Petitioner and the Ford representatives regarding the operation of this businss. One of the main contentions between the Petitioner and the Ford representatives centered around the sales potential and sales objectives assigned by the defendant to the Petitioner as his share of the automobile market of metropolitan Pittsburgh. The sales objectives for 1956 assigned to the Petitioner amounted to 236 new cars; for 1957, 258 new cars and for the first six months of 1958, 127 new cars. (R. 102a). A Ford representative visited the Petitioner each month (R. 21a) in order to secure a monthly new car order proportionately based upon the area sales objective, as set up by Ford. The relations between Petitioner and the Ford representatives progressively became more and more constrained; for example, in July or August of 1956, Heisler, a Ford representative, pre-

sented the Petitioner with a new car order for 22 cars which the Petitioner felt exceeded the number that he estimated he should take (R. 102a); in September of 1956, Heisler presented an excessive demand for 22 cars in the opinion of the plaintiff, who finally agreed to accept 18 cars (R. 21a-25a); the same thing happened in November of 1956 when Heisler insisted upon a 20 car order; the Petitioner offered to take 10 cars since he had 22 to 24 cars in stock, and after much haggling, a 15 car order was finally agreed upon: On many such occasions, the Petitioner refused to accept the specified number of cars as scheduled by the Ford representative, but did finally agree to accept a compromise figure after the Ford representative indicated that he would have to take this matter up with "higher authority" if the Petitioner did not accept the assigned quota. (R. 24a, 25a) It appears that when the Ford representative called upon the Petitioner for a monthly car order the quantity of cars assigned to the Petitioner was always specifically set forth leaving only the duty to the Petitioner of deciding the various models, body styles, etc., to complete the order. (R. 20a, 21a, 31a, 32a, 42a)

In addition, the various Ford representatives insisted that the Petitioner increase the number of his staff both from a sales and service standpoint regardless of whether economic conditions warranted such increases (R. 28a, 29a). The various Ford representatives insisted that the Petitioner spend more money and engage in more promotional activities than the real market in this trading area warranted. (R. 32a, 33a)

In connection with Petitioner's record of performance, it might be well at this point to set forth some Ford statistics. Petitioner's performance record in sales according to Ford's method of calculation was as follows: 49.2 per cent of sales objectives for 1956; 51.5 per cent for 1957; and 28.3 per cent for the first six months of 1958. (106a) Although 1957 was considered a better year saleswise than 1956 and the sales potential for the entire area was increased by Ford (R. 62a), yet in 1957 56 per cent of all Ford's dealers were assigned reduced sales objectives as against 44 per cent whose sales objectives were increased (R. 68a, 69a, 106a). Despite Petitioner's performance record under Ford figures for 1956, his sales objectives were increased from his 1956 assigned objective of 236 to a 1957 assignment of 258 while many older and more experienced dealers had their objectives reduced; for example, O'Neil, a 40 year dealer reduced from 864 in 1956 to 390 in 1957 (R. 79a, 82a); Toohey, a 20 year dealer reduced from 1216 in 1956 to 766 in 1957; Tracey, a 50 year dealer reduced from 407 in 1956 to 282 in 1957; Backus, a 13 year dealer reduced from 253 in 1956 to 177 in 1957; Humes, a 30 year dealer reduced from 246 in 1956 to 181 in 1957; Worlinich, a dealer reduced from 349 in 1956 to 291 in 1957; Etna, a dealer reduced from 778 in 1956 to 547 in 1957; Hill Top, a dealer reduced from 816 in 1956 to 776 in 1957; Pankopf, a dealer reduced from 1089 in 1956 to 957 in 1957; Tracey in Braddock, a dealer reduced from 389 in 1956 to 262 in 1957; Egar, a dealer reduced from 816 in 1956 to 729 in 1957; 3 Rivers, a 13 year dealer reduced from 1089 in 1956 to 1012 in 1957; Carnegie, a

dealer reduced from 472 in 1956 to 410 in 1957; Baron, a dealer reduced from 506 in 1956 to 179 in 1957; Rockwell, a dealer reduced from 217 in 1956 to 134 in 1957; Talerico, a dealer reduced from 282 in 1956 to 234 in 1957; Witherspoon, a dealer reduced from 202 in 1956 to 168 in 1957. (R. 68a-76a)

In December, 1956, Mr. Kellerman succeeded Heisler as the Ford representative assigned to service the Petitioner's dealership. The Petitioner claimed that Kellerman demanded and insisted that the Petitioner take a larger package of sales promotional material than the Petitioner felt that he needed; the Petitioner refused this demand of Kellerman and Kellerman thereon refused to sell the Petitioner any other package. (R. 33a) In so far as Kellerman securing new car orders, the Petitioner experienced the same difficulty with Mr. Kellerman as he did with Mr. Heisler, (R. 83a) claiming that Mr. Kellerman, if anything, was more demanding than Heisler. (R. 63a, 64a)

In March of 1957, in accordance with an assignment from his superiors, Kellerman began inquiring regarding the Petitioner's intentions towards adding additional facilities to his operating plant. In the discussions which followed, the Petitioner indicated that under the circumstances, he believed his present facilities adequate for the business that he was doing and that he could not see his way clear in view of his debt situation to undertake a building program at that time. Mr. Kellerman then arranged a meeting around March 20 with Mr. Fitch, the Assistant District Sales Manager of the defendant, for the purpose

of discussing the possible building program and the sales performance of the Petitioner. (R. 103a) At this meeting, Fitch indicated that it would be necessary for the Petitioner to extend his building to an alley bordering the petitioner's property so that a building approximately 60 feet by 95 feet would have to be built. The Petitioner indicated to Fitch that a building of that size would be totally unnecessary, that he was willing to discuss the building of an addition one half that size at an estimated cost of approximately $50,000.00, but that Fitch indicated such a program would be entirely unsatisfactory. At no time did the defendant inform the Petitioner what minimum standards of additional facilities would be acceptable to it, although such information was known to the defendant as evidenced by Petitioner's Exhibit 13B. (R. 33a-37a, 57a, 58a, 59a, 84a, 90a), Appendix D, infra (49).

At this stage of the relationship between the parties, where there was much disagreement as to sales potentials, and sales objectives in regard to the sale and service of Ford products, where there was a great area of disagreement between the parties as to the adequacy of the operating plant of the Petitioner, where there were differences between the parties as to the number of people to be employed by the Petitioner for an adequate sales and service staff, a new contract was submitted by the defendant to the Petitioner for the franchise of the sale of Ford products. This contract was signed by the parties on April 1, 1957, for a definite term expiring on September 30, 1962. (R. 9a, 29a, 65a) The covering letter of trans-

mittal from Ford accompanying this new agreement (Exhibit B to Defendant's Exhibit 42 R. 217b) states in part as follows:

> "The new agreement is intended to be prospective in effect; it does not deal with the past. It is not intended, however, that the execution and delivery of the agreement should constitute evidence of a decision by either party to continue the relationship with the other for any period of time except in accordance with the provisions of the agreement. In other words, each party may exercise at any time in the future any right granted to it or him under the new agreement and shall not be deemed to have waived or impaired such right by execution and delivery of the new agreement or by anything said or done in this connection.
>
> "Most of our dealers have been performing satisfactorily, but there are a few whose performance and practices have been such that, if continued would not constitute performance of their obligations under the new agreement . . ."

This new agreement did not specify anything specific in regard to quotas, personnel or facilities. (R. 56a)

As a result of the various meetings the Petitioner had with Kellerman and Fitch in regard to facilities, the Petitioner wrote a letter to the defendant dated April 2, 1957, (Defendant's Exhibit 11, R. 123 b) a pertinent part of which is as follows:

> "As for extending my present building facilities, I fully realize that I am in need of additional room. At the present time I have a capital loan from Universal C. I. T. Corporation, also a large amount

unpaid on my present building, and other obligations.

"I have weighed all the facts and problems at hand with deep thought and consideration on extending my building facilities this year, but I will be unable to go into this building program at that early date because of the commitments that are before me at the present."

On June 28, 1957, the Petitioner again met Mr. Fitch regarding the so-called facility commitment of the Petitioner as set forth in his original letter of November 22, 1955, where further discussions were had wherein Fitch indicated that the Petitioner's present facilities were inadequate; and although the Petitioner indicated that he may be in need of additional room, (Defendant's Exhibit 11, letter of April 2, 1957, supra) he could not make any decision as to further expansion until March of 1958 because of his other liabilities (R. 104a). Whereupon Mr. Fitch advised the Petitioner that this attitude was unsatisfactory, and he thereupon referred this matter to his superior, the District Sales Manager, Mr. Harrison Smith.

In due course the Petitioner met Mr. Smith on July 22, 1957, where the whole picture of Petitioner's operation was discussed (R. 104a). At this time, the Petitioner informed Smith that he was willing to engage in a reasonable building program at a somewhat later date but that the facilities suggested by other Ford representatives were completely unreasonable. Mr. Smith's review of the situation after this meeting confirmed his opinion that Petitioner was an unsatisfactory dealer and that he had no other alternative but to recommend termination of the dealership to his superior, the Regional

Sales Manager, Mr. Johnson. Accordingly, by a letter dated July 26, 1957, Mr. Smith wrote to Mr. Johnson recommending termination (Defendant's Exhibit 23) (R. 105a).

Thereafter, Mr. Johnson visited the Petitioner on September 12, 1957, and as a result of his personal investigation, by letter dated October 1, 1957, sent his concurrence and the recommendation for termination to the General Sales Manager at Dearborne, Michigan. A review was made by the General Sales Office at Dearborne and this department concurred in the recommendation for termination which in due course was approved, and on January 28, 1958, (9a) a termination notice was forwarded to the Petitioner (Defendant's Exhibit 25, R. 159b).

After receipt of the termination notice, the Petitioner asked for and received a hearing before the Dealer Policy Board on March 3, 1958. (R. 9a) The Dealer Policy Board confirmed the termination by its letter of May 7, 1958, (R. 9a) (Defendant's Exhibit 28 R. 165b). The Petitioner asked for and received a second hearing before the Dealer Policy Board on July 10, 1958, (R. 9a) but the Dealer Policy Board refused to change its mind and the termination became effective August 11, 1958, in accordance with its letter of notification. (R. 9a)

Thereafter Ford offered the Petitioner certain termination benefits specified in the franchise agreement but only on condition that the Petitioner release the defendant from all liability under the said agreement (R. 40a, 90a, 9a); of course, the Petitioner refused this offer under those conditions and in due course entered this suit seeking redress in accordance with the remedy afforded by the Automobile Dealers Franchise Act.

REASONS FOR GRANTING WRIT

1. The Narrow Interpretation Afforded The Act By The Court Of Appeals Nullifies Its Intent And Purpose.

The Court below erroneously decided an important question of Federal law, which has not been, but should be settled by this Court, when it limited the concept of good faith, introduced into automobile franchise relationships as a matter of public policy, solely to acts of coercion, intimidation or threats thereof, irrespective of whether elements of fairness, equity, reasonableness and justice are injected into the relationship of the parties by contractual obligations or not.

The subject act gave to dealers a cause of action where none previously existed in that, irrespective of contractual obligations, it created a right of review in the federal courts of disputes between manufacturers and dealers involving the good faith of manufacturers in *complying*[1] with or *terminating* or in *not renewing* franchises: *House Report 2850, 84th Congress, 2nd Session, 3 U.S. Code Congress & Administration News 4596 (1956).*

As the Court below has indicated (38), the "critical term" in the act is "good faith" and the problem revolves around its meaning.

At common law the term good faith has been defined as an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law, together with an absence

1. Italics throughout ours.

of all endeavor or privilege of fact which would render the said act unconscionable: *Hilton v. Clements,* 291 N.W. 483, 488 (Neb.); *Gibson v. Corbett,* 200 P. 2nd, 216, 219 (Cal.); *DeFazio v. City of Hoboken,* 79 A. 2nd 877, 879, (N.J.).

The Act itself, in defining the term good faith, uses the words "fair and equitable"—if Congress did not want such elements to be considered, why were such terms used at all—why were they not just left out? The House Report, cited in the Court of Appeals' Opinion (39), says that "good faith must be determined in context of coercion and intimidation"—it is submitted that "in context of", certainly does not mean "limited to" by any definition. Principles of statutory construction state that the plain, obvious and rational meaning of words in a statute are always preferred to any narrow or hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover: *C.I.R. v. Hunt Foods, Inc.,* 204 F. 2nd 429.

The Court of Appeals (40) cites the Woodard v. General Motors Corporation case, 298 F. 2nd 121 (C.A. 5) (1962) as concurring in this limited interpretation. However, it is believed that a reading of the Court's Opinion in the Woodard case reveals a broader concept and, therefore, conflicts with the Third Circuit Court of Appeal's views, for it states on page 127 as follows:

> "The plain meaning construction of the definition would give to a dealer a cause of action only if the actions of the dealer (This is obviously a mistake in printing; the context of this sentence cer-

tainly indicates that the word 'manufacturer' should be substituted.) are not *fair and equitable and are coercive.*"

70 *Harvard Law Review*, 1239 at page 1247 succinctly discusses the meaning of good faith as follows:

"In requiring a manufacturer to act in good faith, the statute compels the courts to recognize the duty which they did not recognize at Common Law. . . . *It is arguable that under this language (of the statute) the good faith requirement is not met if a party has either acted in an unfair and inequitable manner or has coerced the other party.* Under this disjunctive interpretation a manufacturer would be liable if he terminated unfairly and inequitably but without any coercion or threat of coercion. For example, a dealer would have a cause of action if his franchise were arbitrarily terminated by the manufacturer for a personal reason unrelated to a dealer's competence. This interpretation appears to be the only one which would tend to make effective the manufacturer's statutory defense of lack of good faith on the part of the dealer, since the manufacturer rarely if ever, could prove that he had been coerced by the dealer."

Other cases supporting this broader view are *Barney Motor Sales v. California Sales Co.*, 178 F. Supp. 172, 174; *Blenke Bros. v. Chrysler Corporation*, 189 F. Supp. 420-422; *Globe Motors v. Studebaker-Packard Corp.*, CA #60-502 USDC for W. Pa. District, unreported.[2]

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2. Judge Sorg, the District Court Judge in the case at bar, was also the hearing Judge in this case and approximately eight months after the Milos Case, construed the Dealer Franchise Act liberally. His opinion has not been reported in any official reports; the pertinent part of his Opinion follows:

> "The Automobile Dealer's Franchise Act is remedial legislation and, as such should be liberally construed to effect the congressional intent.
>
> "The act provides a remedy in damages for a failure to act in 'good faith' in 'performing and complying' with the franchise as well as upon termination or failure to renew. Good faith imposes a duty on both parties to the franchise to act in a 'fair and equitable manner' toward each other. Although the act grants a dealer a right of action for bad faith on the part of a manufacturer 'so as' to guarantee the dealer freedom from coercion or intimidation, neither the language of the act nor its purpose require that it be limited to cases involving force or compulsion. In this case, although plaintiff was not coerced or intimidated in the sense of being forced to do something against its will, the evidence clearly presented issues of discrimination, of misrepresentation and intentional misleading, and of an intention to force plaintiff out of business once defendant found a more desirable outlet for its cars. This Court does not believe that Congress intended to limit the application of the act to situations in which a dealer is forced to bow to arbitrary demands of the manufacturer under threat of losing his franchise, although the same results can be

Finally, in so far as this particular case is concerned, the Court below should also apply this act after taking into consideration the terms of the contract involved. This was not done for the Court below ignored or failed to consider the elements of fairness, equity and reasonableness that have been made a part of the relationship of the parties in the instant case by the franchise contract itself, and thereby ignored the Respondent's failure to comply with the terms of the contract in this respect.

For example, it is interesting to note the Respondent's usage of the terms good faith, fair and equitable, coercion and intimidation in this franchise contract, where it certainly took great pains to insulate itself from litigation: Paragraph 2g uses the exact words of the statute in defining the term *good faith*. Paragraph 17b brings such ingredients as *reasonable*, *proper* and *fundamental*, *reasonable basis*, as elements to be considered in what is acting in good faith and freedom from coercion and intimidation. Paragraph 25[3] joins the

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achieved through the more subtle device of representations and promises which the manufacturer never intends to fulfill. The jury was entitled to find that defendant's conduct, judged by any standard, was not fair and equitable and amounted to bad faith on its part, and that plaintiff sustained damage as a result thereof."

3. Paragraph 25 was not included in Appellee's Appendix in the Court below and is set forth herein as follows:

"25. Each party acknowledges that no representation or statement, and no understanding or agreement, has been made or exists, and that in entering into this agreement he has not relied upon

words coercion and intimidation, etc., conjunctively with the terms reasonable, fair and equitable. On page ii of the Preamble to the contract, (last sentence in the third paragraph thereof, as set forth on page 187b of the Appellee's Appendix in the Court below) *fair dealing* between the parties is mentioned. Page iii of the Preamble, (fourth paragraph thereof, as set forth on page 189b of the Appellee's Appendix in the Court below) sets forth the election of both parties to this agreement entering into their relationship with their expressed intention to *deal fairly* with each other.

It is, therefore, believed that under the circumstances of this case only the broader concept or meaning of the term, good faith, can be invoked since the Respondent itself injects such elements of fairness and equity, in order to determine whether or not coercion and intimidation exists. The House Report cited supra, 3 U.S. Code Congress & Administration News 4603 (1956), states that "the existence of coercion and intimi-

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anything done or said or upon any presumption in fact or in law, (i) with respect to this agreement, or to the duration, termination or renewal of this agreement, or with respect to the relationship between the parties, other than as expressly set forth in this agreement; or (ii) that in any way tends to change or modify the terms, or any of them, of this agreement or to prevent this agreement from becoming effective; or (iii) that in any way affects or relates to the subject matter hereof. The Dealer also acknowledges that this agreement has been entered into by him without fear and with freedom from coercion, intimidation or threats of coercion or intimidation from the Company and that the terms and conditions of this agreement, and each of them, are reasonable and fair and equitable."

dation depends on circumstances arising in each particular case and may be inferred from a course of conduct." What may be coercion in one case, may not be so in another; e.g., if it was specifically agreed that a dealer was to sell 250 cars a year, then the allocation of 21 cars monthly as an objective could not be considered coercive; but if the agreement was to sell 120 cars yearly, then a 21 car per month objective would be considered coercive.

Thus, fairness and equity must be taken into consideration, especially as here, where it is part of the contract, in order to determine whether one or the other of the parties acted in good faith or was coerced. As a matter of fact the Court below, infra (44) inadvertently or contrary to its general holding, recognizes this factor of fairness when it states that "absent a showing of discrimination or unfairness in the assignment of sales quotas, he has introduced no evidence of coercion or intimidation. . . ."

To determine whether one or the other of the parties are fair and equitable, the terms of the contract must first be examined; and if it cannot be determined thereby, then the circumstance of entering into the contract must be examined, in order to determine the intentions of the parties. These latter matters are further discussed hereinafter.

It is submitted that only this interpretation could comply with the manifest intention of Congress to give a dealer his day in Court and afford protection to a dealer against devious and often oppressive actions of the mighty manufacturers.

2. The Court Of Appeals, In Re-Evaluating The Evidence Contrary To Existing Law and Usual Judicial Procedure, Deprives The Petitioner Of His Right To A Trial By Jury.

Under the Seventh Amendment to the Constitution and the Federal Rule of Civil Procedure No. 38, the Petitioner had a right to a trial by jury: *Beacon Theaters v. Westover*, 359 U.S. 500; *Bieckman v. Kleinert Rubber Co.*, 98 F. Supp. 105, 106; and when the jury brought in a verdict for Petitioner, all evidence, including all reasonable inferences to be drawn therefrom, must be taken in the light most favorable to the Petitioner and not only must all conflicts be resolved in his favor but also he must be given the benefit of every fact and inference of fact pertaining to the issues involved which may be reasonably deduced from the evidence. The Court is not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions or because the Court regards another result as more reasonable. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury and not the reweighing of evidence: *Tennant v. Peoria R.R. Co.*, 321 U.S. 29, 35; *Beacon Theaters v. Westover*, 359 U.S. 500 (1959); *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 696 (1962). And where uncertainty exists as to the facts determining the nature of the relationship between the parties, where the decision as to which witness is telling the truth, and where inferences are to be drawn from the uncontraverted facts and the contraverted facts, all these matters are questions for the jury. If there is a reasonable basis in the

record for concluding that the Respondent failed to act in good faith, it would be an invasion of the jury's function for the Court to draw contrary inferences or to conclude that a different conclusion would be more reasonable: *Ellis v. Union Pacific R. Co.*, 329 U.S. 649; *Lavender v. Kurn*, 327 U.S. 645.

A brief review of the evidence even under the limited interpretation theory of the Court below will demonstrate a substantial basis for the jury's verdict and the error of the Court below in reweighing the evidence. The discussion that follows will center on the two main reasons for termination set forth by the Respondent; namely, sales performance deficiency and facility deficiency.

A. *As To Sales.*

Generally, in regard to sales, the contract of 1957 sets forth nothing specific as to the nature of the Petitioner's obligation (paragraph 2a, R. 192b); no figures were specifically agreed upon as to the amount of cars Petitioner was obliged to sell. The Petitioner claims that when he originally signed for the franchise, he was led to believe that his sales potential was to be "somewhat into 200 cars per year, and that this goal was not expected of him until he had established himself." (R. 91a). The exact meaning of "somewhat into 200 cars per year" was for the jury to determine since there was no clarifying evidence offered on this point; and giving the Petitioner the benefit of all inferences, it may well be inferred that any sales over 100 cars could be a compliance, for 101, 102 or 116 is a figure into 200—as a matter of

fact, anything over 100 approaches the 200 figure, just as anything over 200 becomes "somewhat into 300".

On the contrary, the Respondent claims the Petitioner was informed that his initial potential was to be 228 and attempted to corroborate this figure and infer that Petitioner knew of this figure, by showing that it was set forth in the Prospective Dealer's Questionnaire (Defendant's Exhibit No. 52a, R. 231b). However, this exhibit is purely self-serving for the evidence established that it was neither signed nor its execution participated in by the Petitioner. (R. 92a)

Thus, resolving this conflict in evidence in Petitioner's favor, a reasonable inference could be drawn that plaintiff did adequately perform his sales obligations if he sold in excess of 100 cars.

Did not the Court below err in ignoring or reweighing this pertinent and material fact, for if the petitioner's sales potential was, for the sake of argument, to be reasonably in excess of 100 cars or somewhat into 200, then the Petitioner's sales performance was certainly a better performance percentage-wise than the Respondent has indicated in their charts (R. 235b-239b) As a matter of fact, even if one took the figure of 150 cars as a reasonable sales potential within the meaning of the phrase, "somewhat into 200 cars", the Petitioner's performance percentage would be amongst the best of Respondent's dealers.

The Court below, infra (43), states that the "undisputed evidence" discloses that plaintiff's sales record was sub-standard, not merely in terms of objectives assigned to him, but in comparison with the

record of other dealers . . . ." Here the Court has ignored the "inference rule" benefiting Petitioner, for it is assuming in toto the complete authenticity of the potentials or objectives assigned Petitioner by Respondent; the Court completely ignores the disputed material facts as to what the parties agreed upon in regard to Petitioner's sales responsibilities. The jury decided this question; the Court must abide by it. Thus, if Petitioner should only be held to a quota reasonably in excess of 100 cars, then Respondent's assignment of monthly quota based on figures in excess of 200 cars does "vitalize" Petitioner's claims of coercion and discrimination.

The Court below, infra (44) states that Petitioner's "arguments miss the mark, for absent a showing of discrimination or unfairness in the assignment of sales quotas, he has introduced no evidence of coercion or intimidation on this point." The Court is flatly in error here, for the jury has found that the sales responsibilities of the Petitioner are what the Petitioner claimed them to be, and that the assignment of sales potentials on the basis of Respondent's claims were false bases for assignment of objectives and performance accomplishments, especially in view of Respondent's treatment in lowering potentials of 56 per cent of its other dealers in 1957.

Further, as to the sales potentials or objectives, the Court below in its Opinion (41), states that "the 1957 franchise agreement fails to reveal any evidence of unfairness or inequity" and that the Respondent's application of "criteria provided in the agreement" in setting up sales quotas, "appears to be imminently reasonable, ob-

jective and non-discriminatory." However, it can readily be seen that the Court below erred in the interpretation of the sales provisions of the contract here for it either ignored or disregarded a most pertinent clause, which was even left out of its Footnote 6 in the Opinion setting forth the applicable pertinent clauses pertaining to sales. The clause omitted reads as follows: (Second Paragraph, R. 195b)

> "In applying any criteria referred to in this sub-paragraph 2(a), consideration shall be given to the *history of the dealer's sales performance,* the availability of company products to the dealer and *special local conditions that might effect the dealer's sales* performance."

The Petitioner's dealership covered a "portion of the Metropolitan Pittsburgh area" (Exhibit A of Defendant's Exhibit 42, R. 215b) where many other dealers of the Respondent traded on a non-exclusive and highly competitive basis with each other, (Paragraph 2(a)(1) of Defendant's Exhibit 42, 193b). Petitioner's position here was certainly a special condition, for he specifically had four other dealers within a three to six mile radius—Kennedy, Humes, Greenwald and Three Rivers (R. 30a, 31a, 51a-53a), all old dealers that had many customers in Petitioner's so-called territory. Thus, Petitioner had a two-fold task to perform in building up his business: Taking customers away from these other dealers and securing brand new Ford product potential users in hot competition with these four, together with all other Ford dealers in the metropolitan area. Thus, actually the really pertinent sentences in the contract dealing with sales responsibility applying to Petitioner's dealership, in determining sales quotas by the Respondent, is the

following (The other portions apparently applying only to single dealer points where there is only one dealer in a given area):

> "If the dealer is not the only authorized Ford dealer in the dealership locality, such relationships shall be determined and such comparisons shall be made in the light of the portion of the retail sales of vehicles in the dealer's locality *for which the dealer fairly may be held responsible.*
>
> "In applying any criteria referred to in this sub-paragraph 2(a), consideration shall be given to the *history of the dealer's sales performance,* the availability of company products to the dealer and *special conditions that might effect the dealer's sales performance.*"

In reading these two sentences, the cardinal points that leap therefrom are obvious and are italicized above. Since the Respondent unilaterally sets sales quotas, it is their burden to prove the fairness of the Petitioner's sales responsibility with particular consideration given to the history of the dealer's prior sales performance: *Javierre v. Central Alta Gracia,* 217 U.S. 502; *Mass. Bonding Company case,* 340 Pa. 253, 261; *Malcolm MacDowell & Associate v. Ecorse-Lincoln Park Bank,* 38 N.W. 2nd 921, 924 (Mich.) This the Respondent failed to do; on the contrary, their figures, according to the jury's finding, must properly be held to be unreasonable and discriminatory.

Now, how did the Court below interpret the evidence presented on sales and sales potentials—certainly not in compliance with the above provisions in regard to a multiple dealership area, for complete credence was

given the Respondent's statistics as if the basic potentials or objectives were agreed upon by the parties. We again emphasize the fact that this item of sales potentials was a disputed material fact, resolved by the jury in the Petitioner's favor and not in the Respondent's favor, which the Court below obviously disregarded. It must be remembered that the percentage of performance given Petitioner in sales was based on an arbitrary figure set by the Respondent on *supposed* registration figures—however, Respondent submitted no official figures, only what they said they were; and even though they were not objected to and not necessarily refuted, the evidentiary value of these statistics was still to be passed upon by the jury: *Quock Ting v. U.S.*, 140 U.S. 417, 420-421; *Sartor v. Ark. Gas Corp.*, 321 U.S. 620, 627-8. Under such circumstances, the Respondent could make Petitioner's sales performance percentage whatever they desired.

In contrast to Respondent's figures, the Petitioner presented the testimony of Kennedy, a hostile witness, who claimed his sales potential, before and after the petitioner, when he was held accountable for both his own and petitioner's territory, was 300. In addition and most important, Petitioner established by Respondent's own admissions that sales potentials of 56 per cent of Respondent's dealers were reduced in 1957, even though 1957 was a better year and potentials for the whole area were raised (Refer Plaintiff's Exhibit 7, Appendix E infr. (50-53) and R. 62a, 63a, 68a-76a), under circumstance which clearly evidenced the discriminatory attitude of the Respondent—at least the jury must have thought so, for by its verdict, little credence was given to Respondent's belabored and improbable explanation

for these reductions as compared to reasons for Petitioner's allocation.

The Court below cites the Leech case with approval (42) wherein the statement is made that "only if the percentage factor for any one dealer is out of line could he be prejudiced by the so-called market potential formula." The Respondent recognized that potentials were out of line for 56 per cent of their dealers because of past sales performance—yet ignored the Petitioner's record and increased his potential. Certainly even under this Leech Case statement this can be considered prejudicial.

The Court below refused the Petitioner the benefit of the inferences resulting from such facts, and erroneously dismissed the proper inference by stating (44) that "the adjustment of figures in 1957 proves only that in applying its sales formula for that year, Ford increased the potential of Milos along with that of 44 per cent of its dealers in the metropolitan area." The jury evaluated this evidence otherwise—the Court cannot re-evaluate.

Another inference that the Court completely disregarded and which must resound to the Petitioner's benefit is the fact that after the Petitioner ceased to do business as a dealer, this territory was specifically turned over to Kennedy, yet Kennedy's quota was not increased. Kennedy added only one additional salesman to his organization and as a matter fact, no other dealer was ever established in the Petitioner's so-called locality, which in and of itself must raise an inference in Petitioner's favor that this territory was highly over-rated by the Respondent. Kennedy's letter to Respondent concerning Petitioner's territory certainly confirms this inference (R. 51a-54a)

The Court (43) quotes the District Court's Opinion which again applies the inference rule in reverse when it stated that Petitioner's profit experience "compels an inference to the contrary", that is, that Milos was not coerced in any fashion. The inference certainly must be the other way because of Petitioner's resistance to the demands of the Respondent; under the jury's verdict, he is entitled rather to the inference that he would have sustained a loss had he succumbed to the Respondent's demands on the various items. Are not these salient facts *substantial* evidence, sufficient to support a verdict? Was not the jury justified as reasonable men in drawing such inferences therefrom as to support their findings? It is submitted that this evidence afforded a reasonable basis for concluding that the Respondent failed to act in good faith in the assignment of sales objectives to Petitioner and in the evaluation of Petitioner's sales performance from such unreasonable bases.

The issue of Respondent's good faith in this respect was a question for the jury. *Isabell v. Anderson Carriage Co.*, 136 N.W. 457 (Mich.); *Hatfield v. Barnes*, 168 P. 2nd 552, 553 (Colo.); *Sviggum v. Phillips*, 15 N.W. 2nd, 109 (Minn.).

B. *As To Facilities*

In respect to the adequacy of the Petitioner's facilities, a reference to the contract, Paragraph 2(b) (R. 195a), shows that there is nothing specific stated in the contract pertaining to the size or quality of facilities for which the petitioner obligated himself.

This item is covered in general terms—the petitioner was obligated to furnish adequate facilities to meet his sales and service responsibilities. However, the Court below (42) refers to this provision as "an *unambiguous* contractual obligation" — hardly a proper characterization of such a provision. It must be remembered that while the Respondent was apparently dissatisfied with the nature of the facilities that the Petitioner offered when they initially negotiated this contract and that the Petitioner undertook to furnish suitable and respresentative facilities by his letter of November 30, 1955, the Respondent neither at that time *or any other time* set forth any specifications to guide the Petitioner in this respect. As a matter fact, the Petitioner did fulfill this commitment by the improvements he made in his property as set forth in the recital under the Statement of the Case, infra (6-7); and under the jury's verdict such inference must be invoked and he must be given the benefit of such an inference. Yet the Court below stated, infra (38) that it is not "disputed that he failed to increase his facilities in accordance with his original commitment." This is a complete re-evaluation of evidence, contrary to established law.

It is true that the Petitioner's letter of April 2, 1957, (Defendant's Exhibit 11, R. 123b) stated the realization of the need for additional room; but such a statement is not an admission that his facilities were not representative or adequate for his caliber of dealership. Furthermore, his conversations with the Ford representative in June and July, 1957, certainly off-sets and cancels out the effect of this bit of evi-

dence by indicating a change of mind in regard to building additional facilities, and by the jury's verdict he is entitled to all inferences that he was willing to add to his facilities at a somewhat later date, even though not necessarily contractually obligated nor was the necessity for same imminent.

It must be remembered that the Respondent at all times had a specification of requirements for dealerships of 280 cars as indicated in Plaintiff's Exhibit 13b infra (49) and that these specifications show that to comply with Respondent's own requirements the Petitioner only had to increase his facilities to the extent of approximately 2,740 square feet. Nevertheless, the Respondent's representative demanded that Petitioner increase his facilities a minimum of approximately 6,000 square feet; the Petitioner indicated his willingness to add approximately 3,000 square feet to his facilities. Nevertheless, the Respondent refused to consider the Petitioner's words and attitude as any compliance with their demands, and assigned this as one of the reasons for termination of the contract. In this respect it is also interesting to note Respondent's evaluation of the Petitioner's premises at the very start of the relationship, for the Prospective Dealers Questionnaire (R. 231b) indicates that the Petitioner's premises certainly was not as bad as they would have you believe for they rated the various breakdowns as *good*. Thus, it appears that from the very beginning of the relationship here the Respondent was making demands that were not justified. Yet the Court below infra (42) baldly states in effect that Petitioner did not fulfill an "unambiguous contractual obligation." The

Court had no right to distort, reweigh or revalue the inferences of this evidence to Petitioner's detriment.

Thus, the fact that the Respondent demanded unequivocally the installation and building of increased facilities without even informing the Petitioner of its standard requirements, although well knowing and having in its possession full and complete specifications for the requirements of a dealership actually in excess of the Petitioner's type of dealership; that such demands were made with full knowledge of the Petitioner's financial condition and in total disregard thereof; and that such demands were made without any investigation as to costs or expenses which would be imposed upon the Petitioner in an undertaking of such a building program; that such demands were made even though the Petitioner indicated a willingness to engage in a limited building program at such time in the immediate future as his financial condition would permit and that such demands were made even though the Petitioner's facilities at all times adequately serviced his customers, all these factors were for the purview of the jury; and by virtue of their verdict, the Petitioner is entitled to the inference that the Respondent was completely unfair, inequitable and unjustified in their actions in terminating this contract for the reason of inadequacy of facilities.

The Court's re-evaluation of the evidence in this respect is against applicable law and the usual course of judicial procedure and thereby deprived the Petitioner of his right to a trial by jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,118

ZIGMUND A. MILOS, INDIVIDUALLY AND TRADING AS MILOS FORD SALES,
Appellant,

v.

FORD MOTOR COMPANY AND A. W. KENNEDY MOTOR COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 25, 1963

Before STALEY and SMITH, *Circuit Judges*, and SHAW, *District Judge*.

OPINION OF THE COURT

(Filed May 24, 1963)

By STALEY, *Circuit Judge*.

Plaintiff Zigmund A. Milos appeals from a judgment of the district court entered upon its order granting defendant Ford Motor Company's motion for judgment under Rule 50, F. R. Civ. P., following a jury verdict in favor of plaintiff. Plaintiff brought suit under the Automobile Dealers Day in Court Act, 15 U.S.C.A. §§ 1221-1225, seeking damages for the termination of his franchise agreement.[1]

1. The complaint also averred a violation of the Anti-Trust laws, but the [illegible] claim [illegible] abandoned.

Appendix "A"

The operative facts may be summarized as follows: In 1955 Ford reviewed its sales outlets in the metropolitan area of Pittsburgh, Pennsylvania, and decided that an "open point" existed in the Oakmont-Verona section. Plaintiff applied for the new dealership, but the adequacy of his facilities was questioned by several Ford representatives. However, on November 30, 1955, shortly after plaintiff signed a commitment letter acknowledging this deficiency and promising to remedy it within two years of his acceptance by Ford,[2] the parties executed a franchise contract for an indeterminate term.

In 1956 differences arose concerning the operation of the franchise. Apparently these were centered on the sales quotas which had been assigned to Milos, although the record also indicates that there were discussions concerning the size of plaintiff's staff and the amount of promotional material which he should purchase. In March 1957, a Ford representative asked plaintiff when he intended to add facilities to his enterprise. Later that month Milos met with Fitch, Ford's assistant district sales manager, for the purpose of discussing a building program and plaintiff's sales performance. Fitch again pressed the necessity for expansion, but plaintiff stated that he was willing to discuss an addition approximately half the size of that advocated by Fitch.

On April 1, 1957, a new franchise agreement was executed, the expiration date of which was September 30, 1962. The expiration date was made subject to the termination provisions of the agreement.[3] On April 2, 1957, plaintiff

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2 The letter states:

"The writer fully appreciates that the present facilities, under which I am now operating, are totally inadequate for proper representation of a Ford Dealer, therefore upon the acceptance of myself as a Ford Dealer by the Ford Motor Company, I agree to secure representative and suitable facilities including showroom, parts department, office and service department within a period of two (2) years from the date of my acceptance."

3 The relevant provision is paragraph 17(a)(1), which provides in pertinent part:

"17(a) Termination. The following provisions shall govern termination of this agreement:

wrote to Fitch acknowledging his need for additional facilities but stating that he would be unable to engage in a building program during 1957.[4] This issue was discussed again with Fitch on June 28, 1957, Milos declaring that financial difficulties precluded a decision on expansion until March 1958. Fitch then referred the matter to Smith, Ford's district sales manager.

The entire operation of the franchise was discussed at a meeting with Smith on July 22, 1957. Milos said that he was willing to engage in a reasonable building program at a later date but the size of the facilities suggested by the Ford representatives was unreasonable. Smith then wrote to Johnston, regional sales manager, on July 26, 1957, recommending termination of Milos' franchise. Johnston visited plaintiff on September 12, 1957. Subsequently, in a letter to the general sales manager in Dearborn, Michigan, Johnston reported on his interview with Milos and forwarded the file which recommended dealer termination. The general sales office reviewed the matter, and on January 28, 1958, a termination notice was sent to Milos.[5]

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3 (Continued)

"(1) The Company may terminate by notice given to the Dealer not less than ninety (90) days prior to the effective date of such notice in the event the Dealer shall have failed to fulfill or perform any one or more of the duties, obligations or responsibilities undertaken by him pursuant to paragraphs 2, 10, 11, 12, 13 and 15 . . ."

4 The following is a portion of that letter:

"As for extending my present building facilities I fully realize that I am in need of additional room. At the present time I have a Capital Loan from Universal CIT Corporation, also a large amount unpaid on my present building and other obligations.

"I have weighed all the facts and problems at hand with deep thought and consideration on extending my building facilities this year. But I will be unable to go into this building program at that early date because of the commitments [sic] that are before me at the present time.

"I feel if the Ford Motor Company will bear with me that we can work this problem out in the near future."

5 The notice provides in pertinent part:

"Notice of termination, effective as hereinafter provided, is hereby given by Ford Motor Company of its Ford Sales Agreement with you dated April 1, 1957 pursuant to subparagraph 17 (a) (1) of said Sales Agreement and because of your failure to perform your duties, obligations and responsibilities under subparagraphs 2(a) and 2(b) of the said Ford Sales Agreement." Subparagraphs 2(a) and 2(b) are set out *infra* at n. 6.

Appendix "A"

At plaintiff's request a hearing was granted before defendant's Dealer Policy Board on March 3, 1958. The Board confirmed the termination by letter of May 7, 1958. A second hearing was had before the Board on July 10, 1958, but to no avail, and the termination became effective August 11, 1958. Certain benefits were offered to plaintiff on condition that he release Ford from further liability under the agreement, but Milos refused this offer and instituted the present suit.

At the outset, it should be noted that Milos admits that he did not fulfill the sales objective assigned to him. Nor is it disputed that he failed to increase his facilities in accordance with his original commitment. These were the reasons assigned by Ford for terminating his franchise. The essence of plaintiff's contention is that these sales and facilities requirements were oppressive and unreasonable, and Ford's insistence upon them constituted a failure to act in "good faith" as required by the statute.

The Act grants a dealer the right to sue for damages by reason of the failure of the manufacturer to act in good faith in performing or complying with any of the terms or provisions of the franchise, *or in terminating*, canceling, or not renewing the franchise with said dealer. * * * " (Emphasis supplied.) 15 U.S.C.A. § 1222. The critical term is "good faith" which is defined as "the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of, coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." 15 U.S.C.A. § 1221(c). Plaintiff urges that we construe the term liberally, not confining it to acts of coercion and intimidation. As he puts it, "conduct dealing with reasonableness, fairness, justice and equity

in and of themselves (without coercion) can be taken into consideration in other circumstances in determining whether or not an actionable cause arises under the Dealers Franchise Act . . . .

The plain language of the statute does not warrant such an approach; the legislative history rejects it. Perhaps the most succinct and direct refutation of plaintiff's contention is found in the following excerpt from the House Report:

> "The principal effect of the bill as amended by the committee is to give the dealer a right of action against the manufacturer, where the manufacturer fails to act in a fair and equitable manner so as to guarantee the dealer freedom from coercion, intimidation, or threats of coercion or intimidation. The term 'fair and equitable' as used in the bill is qualified by the term 'so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party.' In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation. Each party to an automobile franchise would have a special obligation to guarantee the other party freedom from coercion or intimidation of any kind." H.R. Rep. No. 2850, 84th Cong., 2d Sess. (1956); 3 U.S. Code Cong. & Adm. News 4506, 4603 (1956).

The issue was again raised on the floor of the House in the following colloquy:

> "Mr. Halleck. In other words, while the words 'fair and equitable' are used, speaking of the relationship between the parties, those words 'fair and equitable' would be limited, as this language is contained in the bill, to 'coercion and intimidation.'
>
> "Mr. Celler. That is correct." 102 Cong. Rec. 14070 (1956).

Hence, it is not surprising that the cases fully support this limitation. Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425 (C.A.2, 1962); Woodard v. General Motors Corp., 298 F.2d 121 (C.A.5, 1962); Augusta Rambler Sales, Inc. v. American Motors Sales Corp., 213 F. Supp. 889 (N.D.Ga., 1963); Leach v. Ford Motor Co., 189 F. Supp. 349 (N.D.Cal., 1960); Staten Island Motors, Inc. v. American Motors Sales Corp., 169 F. Supp. 378 (D.N.J., 1959). See also 70 Harv. L. Rev. 1239, 1247-1250 (1956-1957); 66 Yale L. J. 1135, 1171-1180 (1957). But see Barney Motor Sales v. Cal Sales, Inc., 178 F. Supp. 172 (S.D.Cal., 1959).

Plaintiff urges that even under this construction of the Act sufficient evidence of coercion and intimidation was adduced to justify the jury's verdict. He prefaces this with a reminder of the limited scope of our review in cases in which the jury has returned a verdict. In support of that verdict, he asserts that Ford's termination of the contract before the expiration date is prima facie evidence of a violation; that the franchise agreement reeks with unfairness and inequity; and that Ford's demands regarding his sales quotas and his facilities were oppressive and unreasonable. He particularizes his sales-performance objection by stating that his quotas were unfair as compared with those of other dealers in the area. Lastly, he advances the proposition that because the manufacturer sets the sales figures, it has the burden of proving that they are reasonable and justified.

The argument that termination before expiration is prima facie evidence of a violation is untenable. The Act expressly conditions recovery of damages on a failure of the manufacturer to act in good faith. Termination in itself does not suffice. As this court stated in Bateman v. Ford Motor Co., 302 F.2d 63, 66 (C.A.3, 1962): "A franchise is not a marriage for life." The following excerpt from the House Report makes that clear:

"The bill, however, does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not renew an inefficient or undesirable dealer's franchise." 3 U.S. Code Cong. & Adm. News 4603 (1956).

The terms of the 1957 franchise agreement fail to reveal any evidence of unfairness or inequity.[6] With respect

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6 The pertinent clauses relating to sales and facilities are subparagraphs 2(a) and 2(b), which provide in relevant part:

"2. (a) *Sales and Service Responsibility.*

(b) *Sales.* The Dealer shall promote vigorously and aggressively the sale of VEHICLES at retail, and the sale of other COMPANY PRODUCTS, in the DEALER'S LOCALITY, making use to the greatest reasonable extent of the Company's advertising and sales promotions and merchandising material, and shall develop energetically and satisfactorily the potentiality for such sales and obtain a reasonable share thereof, but the Dealer shall not be limited to the DEALER'S LOCALITY in making sales. Whether or not the Dealer shall have vigorously and aggressively promoted such sales in the DEALER'S LOCALITY and shall have energetically and satisfactorily developed the potentiality for such sales and obtained a reasonable share thereof, shall be determined by reference to such reasonable criteria as the Company may develop from time to time including, without limitation, (1) the case of VEHICLES (A) the relationship of the Dealer's retail sales of VEHICLES to users located in the DEALER'S LOCALITY to (a) the total registrations of VEHICLES in such locality, (b) the fair and reasonable retail sales objectives of VEHICLES established for the Dealer for such locality, and (c) the registrations of automobiles (or trucks) of other manufacturers selected by the Company and generally competitive with VEHICLES in price and product characteristics (hereinafter called "Competitive Vehicles") in such locality; and (2) comparison of each of the relationships referred to in the foregoing clause (1) with (a) similar relationships with respect to each of not less than three other authorized Ford dealers of reasonably comparable size and located in the nearest areas of sales and service responsibility reasonably comparable to the DEALER'S LOCALITY, and (b) similar relationships with respect to the average of all authorized Ford dealers in a group in one or more of the following areas: the Company's zone sales area in which the Dealer is located, the Company's district sales area in which the Dealer is located, the Company's regional sales area in which the Dealer is located, and the national sales area. If the Dealer is one of not more than two authorized Ford dealers in the DEALER'S LOCALITY, such relationships shall be determined and such comparisons shall be made in the light of the portion of the retail sales of VEHICLES in the DEALER'S LOCALITY for which the Dealer fairly may be held responsible.

"2. (b) *Place of Business, Facilities and Equipment.* The Dealer shall establish, maintain and equip a place or places of business in the DEALER'S LOCALITY, including a salesroom for VEHICLES, facilities for parts and accessories sales, service facilities and a used passenger automobile and

to sales quotas, the criteria provided in the agreement, e.g., the relationship of sales to vehicle users and the total registration of vehicles in the area, appear to be eminently reasonable, objective and nondiscriminatory. In this regard the comment of the district court in Leach v. Ford Motor Co., 189 F. Supp. at 352, is appropriate:

> "Assignment of a market potential in the course of honest business judgment by a manufacturer to a dealer as a measure of expected performance within an area is not inherently unfair or arbitrary. A market potential is not a requirement that a dealer sell a given number of cars in any event. Rather, it is a percentage factor of one dealer's share of sales by many dealers in an area. * * * Only if the percentage factor for any one dealer is out of line could he be prejudiced by the so-called market potential formula."

Having determined that the contract is not coercive as written, we now turn to the question of whether it was administered in bad faith. With respect to the adequacy of plaintiff's facilities, it will be recalled that Milos himself acknowledged this deficiency and the first franchise was granted only after he promised to remedy it within two years. Thus, this is not a case of a manufacturer who, having induced a dealer to accept a franchise and make a substantial investment, then seeks to compel him to expand his facilities. Rather, it is a case of one party to a contract freely entered into requiring the other party to perform. An attempt to enforce an unambiguous contractual obligation, under these circumstances, can hardly

truck outlet, of such lay-out, appearance and size as will enable the Dealer adequately to develop in the DEALER'S LOCALITY the good will of customers and prospective customers and their acceptance of COMPANY PRODUCTS and to meet his sales and service responsibilities hereunder; install and maintain therein tools, machinery and equipment recommended by the Company, or of a quality and efficiency equivalent thereto, and adequate to meet the normal service requirements of owners of COMPANY PRODUCTS in the DEALER'S LOCALITY to the extent of his sales and service responsibilities hereunder; and maintain the operation of such place or places of business during and for not less than the business hours customary in the trade in the DEALER'S LOCALITY. * * *"

be said to constitute coercion or intimidation. Woodard v. General Motors Corp., 298 F.2d at 128.

As pointed out by the district court, the undisputed evidence discloses that plaintiff's sales record was substandard, not merely in terms of the objectives assigned to him, but in comparison with the record of other dealers.[7] That evidence devitalizes the assertion of coercion, intimidation, and discrimination. However, plaintiff seeks solace in his claim that the sales quota of Kennedy, a dealer in his area, was 300 cars both before and after the existence of the Milos franchise. He also makes much of the fact that in 1957 his potential was increased, whereas that of 56 per cent of all other dealers was decreased and only 44 per cent had a quota increase.

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7 The following is an excerpt from the district court's opinion:

"Plaintiff's sales in comparison to the sales objectives assigned to him by Ford and with other metropolitan dealers are not in dispute. In 1956, plaintiff sold 116 new cars which was 49.2% of his total monthly sales objective of 236 cars; sales of all dealers in the zone to which he was assigned were 85.1% of total objectives; sales of all dealers in the Pittsburgh district were 93% of total objectives. In 1957, he sold 133 new cars which was 51.5% of his total monthly sales objective of 258 new cars; sales of zone dealers were 90.4% and of all district dealers 95% of total sales objectives. In the first six months of 1958, plaintiff sold 36 new cars which was 28.3% of his total sales objective of 127 new cars; sales of zone dealers were 59.8% and of all district dealers 84.3% of total objectives. Registrations of new Fords in the postal zones of Oakmont and Verona were 227 in 1956, 207 in 1957, and 70 in the first six months of 1958; no figures were available for Unity, originally included in calculating plaintiff's sales potential, but registrations there had previously averaged 18.20 new cars per year.

"Although the evidence presented, viewed in the light most favorable to the plaintiff, did establish a variation in market potentials assigned to other dealers in the area of his franchise, it fails to disclose that they were based upon any different standards than those applied to him. It further fails to disclose that any standards of performance other than those expressly adopted by the parties in Subparagraph 2(a)(iii) of the Franchise Agreement * * * were applied in the establishing of his sales potential. This Court, therefore, is of the opinion that plaintiff, in addition to proving a lack of good faith in the matter of allegedly discriminatory assignment of performance standards, has to be more than is there any evidence that Milos was coerced into accepting more inventory than his market could absorb. Indeed, his profit experience and the amount of any claim based on losses sustained in this respect cannot be determined on the present record. It is disclosed, however, by undisputed evidence that plaintiff's sales performance in his thirty-six months as a Ford dealer was about 50% below the average level of performance of other dealers in the area." Milos v. Ford Motor Co., 206 F. Supp. 86, 92 (W.D.Pa. 1962).

With respect to Kennedy's quota, the record clearly discloses that it was reduced from 391 cars in 1955 to 163 in 1956, after the establishment of plaintiff's dealership. More important than this, plaintiff's arguments miss the mark, for absent a showing of discrimination or unfairness in the assignment of sales quotas, he has introduced no evidence of coercion or intimidation on this point. The adjustment of figures in 1957 proves only that in applying its sales formula for that year, Ford increased the potential of Milos along with that of 44 per cent of its dealers in the metropolitan area.

The contention that Ford had the burden of proving that its sales figures were reasonable is without merit. The Act conditions recovery on a failure of the manufacturer to act in good faith, and the Senate Report declares: "As in all actions under this bill, the dealer would have the burden of showing absence of good faith by the manufacturer." S. Rep. No. 2073, 84th Cong., 2d Sess. (1956). See also 102 Cong. Rec. 14071 (1956) (Remarks of Representative Celler). Moreover, even assuming the validity of plaintiff's proposition, we have previously indicated that there is nothing inherently unfair or arbitrary in the assignment of a market potential.

The sum of all this is that the record is devoid of any evidence which would support a jury finding that the termination of plaintiff's franchise resulted from the failure of Ford to act in "good faith" as that term is defined in the Automobile Dealers Day in Court Act.

Of course, our conclusion makes it unnecessary for us to consider Ford's alternative arguments challenging the constitutionality of the statute.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,118

ZIGMUND A. MILOS, individually and trading as MILOS FORD SALES, Appellant

vs.

FORD MOTOR COMPANY and A. W. KENNEDY MOTOR COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: STALEY and SMITH, Circuit Judges, and SHAW, District Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of April 4, 1962, entered April 5, 1962, of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
IDA O. CRESKOFF
Clerk

May 24, 1963

APPENDIX "C"

PUBLIC LAW 1026—84th CONGRESS

(Act of August 8, 1956, Chap. 1038, Secs. 1-5, 70 Stat. 1125; 15 U. S. Code, Secs. 1221-1225.)

AN ACT to supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise automobile dealers to bring suit in the district courts of the United States to recover damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers.

* * * * * * *

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

* * * * * * *

That as used in this Act—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any auto-

mobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: PROVIDED, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. (August 8, 1956, Chap. 1038, Sec. 1, 70 Stat. 1125; 15 U.S. Code, Sec. 1221.)

Sec. 2. An automobile dealer may bring suit against any automobile manufacturer engaged in com-

merce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after the passage of this Act to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: PROVIDED, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. (August 8, 1956, Chap. 1038, Sec. 2, 70 Stat. 1125; 15 U.S. Code, Sec. 1222.)

Sec. 3. Any action brought pursuant to this Act shall be forever barred unless commenced within three years after the cause of action shall have accrued. (August 8, 1956, Chap. 1038, Sec. 3, 70 Stat. 1125; 15 U.S. Code, Sec. 1223.)

Sec. 4. No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States. (August 8, 1956, Chap. 1038, Sec. 4, 70 Stat. 1125; 15 U.S. Code, Sec. 1224.)

Sec. 5. This Act shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this Act and an express provision of State law which can not be reconciled. (August 8, 1956, Chap. 1038, Sec. 5, 70 Stat. 1126; 15 U.S. Code, Sec. 1225.)

MILOS FORD SALES
OAKMONT, PA.

Plfs Ex. 138

Original Facility	--	Showroom:	700	
		Office:	200	
		Parts:	240	Enlarged which took space away from Service.
		Service:	2460	Can work on max. of 5 cars in shop. Only on 4 comfortably.
			3600	
Added in Summer of 1956	—	Service	500	Did not consult with us when he added this.
			4100	Sq. Ft.

For dealership of 280 potential, minimum basic requirement for new facility would be as follows, based on planning of Service Dept. in Dearborn and our Service Department standards:

2 Car Showroom (35 x 28):	980 sq. ft.
Offices (22 x 30):	660
Parts - space required for inv. on ideal turn basis (4 per year):	1000
Service:	
2 Bays - New car prep., 1,000 & warranty	
6 Bays - Customer repair labor	
2 Bays - Used Car Reconditioning	
10 Bays	4200
	6840 sq. ft.

This does not include paint & body shop.

Dealer record shows he is presently employing 3 mechanics. To accomplish his labor objective would require a minimum of 5 mechanics working at 100% efficiency.

Mr. Fitch, Asst. District Sales Manager, asked Mr. Milos to enlarge his facility back to the alley. This request was made in the presence of the Field Manager, J. N. Kellerman. This would give sufficient service and parts area.

Dealer does not want to do a sales job commensurate with responsibility as a Pittsburgh Dealer. A comparison of population, potentials and registrations on the Oakmont Area and the Cheswick Area is as follows:

REGISTRATIONS

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	1950 Population	Car Potential	REGISTRATIONS 1956 F	1956 C	1956 Ind.	1957 F	1957 C	1957 Ind.
Cheswick & R.D.	1534		93	69	379	103	69	366
Springdale	6646		53	47	231	63	46	247
	8180	208	146	116	610	166	115	612
Oakmont	7264		71	64	359	60	50	355
Verona & R.D.	4325		166	187	737	144	180	732
	11589	248	237	251	1096	204	230	1087

Appendix D

DEALER W. J. Tracey

SALES VS OBJECTIVES	1956	1957	1958
CAR OBJECTIVE	407	287	268
CAR SALES	322	235	306
% ACCOMPLISHMENT	79.1	101.1	114.2
TRUCK OBJECTIVE	48	46	43
TRUCK SALES	31	32	33
% ACCOMPLISHMENT	64.5	71.1	76.7
PARTS OBJECTIVE	67833	69510	69200
PARTS SALES	68339	81196	82918
% ACCOMPLISHMENT	100.7	116.8	93.0
LABOR OBJECTIVE	60000	53783	66500
LABOR SALES	58178	62062	63434
% ACCOMPLISHMENT	96.9	115.4	95.4

Appendix "E"

DEALER Backus Mtr. Co.

	1956	1957	1958
SALES VS OBJECTIVES			
CAR OBJECTIVE	253	177	150
CAR SALES	203	253	167
% ACCOMPLISHMENT	80.2	131.6	111.3
TRUCK OBJECTIVE	30	21	19
TRUCK SALES	22	26	17
% ACCOMPLISHMENT	73.3	123.8	89.5
PARTS OBJECTIVE	45000	53524	66700
PARTS SALES	46629	60706	55219
% ACCOMPLISHMENT	103.6	108.4	82.9
LABOR OBJECTIVE	35000	34372	58400
LABOR SALES	36695	54358	45036
% ACCOMPLISHMENT	105.4	158.7	77.1

Appendix "E"